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May 4, 2015

VIA ECFS ***EX PARTE***

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW, Room TW-A325
Washington, DC 20554

Re: ***Petition of USTelecom for Forbearance Pursuant to 47 U.S.C. § 160(c) from Enforcement of Obsolete Incumbent LEC Legacy Regulations that Inhibit Deployment of Next-Generation Networks,*** **WC Docket No. 14-192**

Dear Ms. Dortch:

Granite Telecommunications, LLC ("Granite"), through its undersigned counsel, hereby files in the record of the above-referenced proceeding a copy of a petition for declaratory ruling filed by Granite today regarding the separation, combination, and commingling of Section 271 unbundled network elements.

Please do not hesitate to contact me if you have any questions or concerns regarding this submission.

Respectfully submitted,

/s/ Thomas Jones

Counsel for Granite Telecommunications, LLC

Attachment

WILLKIE FARR & GALLAGHER LLP

STAMP IN

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May 4, 2015

VIA HAND DELIVERY

Accepted / Filed

MAY - 4 2015

Federal Communications Commission
Office of the Secretary

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW, Room TW-A325
Washington, DC 20554

Re: ***Petition of Granite Telecommunications, LLC for Declaratory Ruling Regarding the Separation, Combination, and Commingling of Section 271 Unbundled Network Elements*, WC Docket No. _____**

Dear Ms. Dortch:

Pursuant to Sections 1.2(a) and 1.51(c) of the Commission's rules,[1] Granite Telecommunications, LLC, through its undersigned counsel, hereby files one original and one copy of the enclosed Petition for Declaratory Ruling.

Please do not hesitate to contact me if you have any questions or concerns regarding this submission.

Respectfully submitted,

Thomas Jones
Nirali Patel

Counsel for Granite Telecommunications, LLC

[1] 47 C.F.R. §§ 1.2(a), 1.51(c).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Petition of Granite Telecommunications, LLC	)	WC Docket No. ____
for Declaratory Ruling Regarding the	)	
Separation, Combination, and Commingling of	)	
Section 271 Unbundled Network Elements	)	

PETITION FOR DECLATORY RULING

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May 4, 2015

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PETITION FOR DECLATORY RULING

Pursuant to Section 1.2(a) of the Commission's rules,[1] Granite Telecommunications, LLC ("Granite"), through its undersigned counsel, hereby submits this petition for a declaratory ruling to remove uncertainty as to Bell Operating Companies' ("BOCs'") obligations (1) not to separate unbundled network elements ("UNEs") provisioned pursuant to Section 271(c)(2)(B)(iv)-(vi) of the Act;[2] (2) to combine such UNEs; and (3) to commingle such UNEs with other wholesale services.

I. INTRODUCTION AND SUMMARY

Granite provides voice and other services to more than half a million locations of large, multi-location businesses in the United States, including 86 of the companies in the *Fortune* 100. Granite has brought competitive choice to these business locations by obtaining combinations of the network elements listed in Section 271(c)(2)(B)(iv)-(vi) of the Act—unbundled local loops, local transport, and local switching—from the BOCs as inputs to its retail services. Granite purchases combinations of loops, shared transport, and switching pursuant to commercial

[1] 47 C.F.R. § 1.2(a) ("The Commission may, . . . on motion or on its own motion issue a declaratory ruling terminating a controversy or removing uncertainty.").

[2] 47 U.S.C. § 271(c)(2)(B)(iv)-(vi).

agreements with the BOCs, and the independent unbundling obligations of Section 271(c)(2)(B)(iv)-(vi) serve as a crucial regulatory backstop for Granite's negotiations of these agreements. However, as discussed in Part II below, the absence of Commission rules governing Section 271 UNEs and a recent filing by USTelecom, in which it asserted that BOCs have no legal obligation to provide Section 271 UNEs in combination with each other, have created uncertainty as to the BOCs' obligations regarding the separation, combination, and commingling of Section 271 UNEs.

To remove this uncertainty, the Commission should issue a declaratory ruling clarifying the manner in which the prohibition on unreasonable discrimination in Section 202(a) of the Act and the prohibition on unjust and unreasonable practices in Section 201(b) apply to the separation, combination, and commingling of Section 271 UNEs as follows:

1. Where the requested Section 271 UNEs are already combined in a BOC's network for the provision of a telecommunications service, the BOC may not separate those UNEs unless requested by the competitive LEC or unless the BOC has a reasonable basis for doing so.

2. Where the requested Section 271 UNEs are not already combined in a BOC's network, the BOC must combine those UNEs upon request from the competitive LEC unless the BOC has a reasonable basis for refusing to do so.

3. BOCs are required to commingle, or allow competitive LECs to commingle, a Section 271 UNE or combination of such UNEs with wholesale services obtained from an incumbent LEC unless the BOC has a reasonable basis for refusing to do so.

As explained in Part III below, these clarifications are consistent with the terms of the Act and Commission precedent. They would also establish much-needed stability in the rules governing Section 271 UNEs, thereby enhancing the ability of competitive LECs, such as Granite, to bring the benefits of competition to American businesses.

II. BACKGROUND

A. Section 251 Unbundling Obligations and Rules Regarding the Separation, Combination, and Commingling of Section 251 UNEs

Section 251(c)(3) of the Act requires incumbent LECs to provide requesting telecommunications carriers, for the provision of a telecommunications service, with "nondiscriminatory access to network elements on an unbundled basis . . . on rates, terms, and conditions that are just, reasonable, and nondiscriminatory."[3] Section 251(c)(3) also requires incumbent LECs to "provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service."[4] Pursuant to these provisions, the Commission established rules governing the combining[5] of Section 251 UNEs, including rules (1) prohibiting incumbent LECs, except upon request, from separating requested UNEs that are currently combined in the incumbent LEC's network;[6] (2) requiring incumbent LECs, upon request, to perform the functions necessary to combine UNEs, even if those elements are not already or ordinarily combined in the incumbent LEC's network (so long as the combination is technically feasible and would not undermine the ability of other carriers to obtain access to UNEs or interconnect with the incumbent LEC);[7] and

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[3] 47 U.S.C. § 251(c)(3).

[4] *Id.*

[5] *See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection Between Local Exchange Carriers and CMRS Providers*, First Report and Order, 11 FCC Rcd. 15499, n.620 (1996) (subsequent history omitted) ("In this context, we conclude that the term 'combine' means connecting two or more unbundled network elements in a manner that would allow a requesting carrier to offer the telecommunications service it seeks to offer.").

[6] 47 C.F.R. § 51.315(b).

[7] *Id.* § 51.315(c).

(3) requiring incumbent LECs, upon request, to perform the functions necessary to combine UNEs with the requesting carrier's network elements in any technically feasible manner.[8]

Pursuant to the nondiscrimination requirement of Section 251(c)(3), the prohibition on unreasonable discrimination in Section 202(a),[9] and the prohibition on unjust and unreasonable conduct in Section 201(b),[10] the Commission also adopted rules governing the commingling of Section 251 UNEs with wholesale services (such as Section 271 UNEs as well as switched and special access services).[11] In particular, the Commission established rules (1) requiring an incumbent LEC to allow a requesting carrier to commingle a Section 251 UNE or combination of such UNEs with wholesale services obtained from an incumbent LEC;[12] and (2) requiring an incumbent LEC itself, upon request, to perform the functions necessary to commingle a Section 251 UNE or combination of such UNEs with one or more wholesale services obtained from an incumbent LEC.[13]

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[8] *Id.* § 51.315(d).

[9] 47 U.S.C. § 202(a).

[10] *Id.* § 201(b).

[11] *See Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*; *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd. 16978, ¶ 579 (2003) ("*TRO*") ("By commingling, we mean the connecting, attaching, or otherwise linking of a UNE, or a UNE combination, to one or more facilities or services that a requesting carrier has obtained at wholesale from an incumbent LEC pursuant to any method other than unbundling under section 251(c)(3) of the Act."), *vacated and remanded in part on other grounds*, *United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004); *see also BellSouth Telecomms., Inc. v. Kentucky Pub. Serv. Comm'n*, 669 F.3d 704, 712 (6th Cir. 2012) (holding that incumbent LECs must commingle Section 251 UNEs with Section 271 UNEs upon request).

[12] 47 C.F.R. § 51.309(e).

[13] *Id.* § 51.309(f).

Congress directed the Commission to determine which network elements must be unbundled under Section 251(c)(3) in accordance with the standards in Section 251(d)(2).[14] Pursuant to these standards, in 2005, the Commission revised the list of elements that must be provided as UNEs under Section 251(c)(3). Most importantly, the Commission held that incumbent LECs have no obligation to provide local switching[15] or shared transport[16] as Section 251 UNEs.

B. Section 271 Unbundling Obligations

The "[c]ompetitive checklist" of Section 271 of the Act requires BOCs to provide competitors with unbundled access to local loops, local transport, and local switching.[17] These unbundling obligations are ongoing and independent of any unbundling analysis under Section 251 of the Act.[18] Accordingly, BOCs must provide unbundled access to the network elements listed in items 4-6 of the Section 271 competitive checklist even if those elements are not subject to unbundling under Section 251(c)(3).[19] And in the absence of Section 251 unbundling

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[14] *See* 47 U.S.C. § 251(d)(2)(B) (requiring the Commission to consider "at a minimum" whether failure to provide access to a network element would "impair" the ability of the requesting telecommunications carrier to provide service).

[15] *Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Order on Remand, 20 FCC Rcd. 2533, ¶ 199 (2005) ("*TRRO*"), *aff'd sub nom. Covad Commc'ns Co. v. FCC*, 450 F.3d 528 (D.C. Cir. 2006).

[16] *TRRO* n.529.

[17] *See* 47 U.S.C. § 271(c)(2)(B)(iv)-(vi) (requiring incumbent LECs to provide "[l]ocal loop transmission from the central office to the customer's premises, unbundled from local switching or other services"; "[l]ocal transport from the trunk side of a wireline local exchange carrier switch unbundled from switching or other services"; and "[l]ocal switching unbundled from transport, local loop transmission, or others services").

[18] *See TRO* ¶¶ 653-654.

[19] *See id.*

obligations for local switching and shared transport, the Section 271 competitive checklist provides the only regulatory compulsion for BOCs to provide these network elements on an unbundled basis today.

C. Uncertainty as to BOCs' Obligations Regarding the Separation, Combination, and Commingling of Section 271 UNEs

The Commission has held that the rates, terms, and conditions for UNEs that must be provided only under Section 271 are governed by Sections 202(a) and 201(b) of the Act.[20] Although the Commission has not adopted rules explicitly addressing the separation, combination, or commingling of Section 271 UNEs, the application of Sections 202(a) and 201(b) should dictate that a BOC may not separate or refuse to combine or commingle Section 271 UNEs unless it has a reasonable basis for doing so. But the absence of explicit Commission rules to this effect have created some uncertainty as to whether this is in fact the case. Moreover, USTelecom has recently argued that a single footnote in the *TRO* somehow supports the conclusion that BOCs have no legal obligation to combine Section 271 UNEs.[21] Thus, the absence of explicit agency rules and USTelecom's argument have created uncertainty as to the BOCs' obligations not to separate, to combine, and to commingle Section 271 UNEs.

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[20] *See Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, 15 FCC Rcd. 3696, ¶ 470 (1999) ("*UNE Remand Order*") ("If a [section 271] checklist network element does not satisfy the unbundling standards in section 251(d)(2), the applicable prices, terms and conditions for that element are determined in accordance with sections 201(b) and 202(a)."), *vacated and remanded in part on other grounds*, *United States Telecom Ass'n v. FCC*, 290 F.3d 415 (D.C. Cir. 2002); *TRO* ¶ 662 ("We reach essentially the same result here [as in the *UNE Remand Order*] . . . .").

[21] *See* Reply Comments of the United States Telecom Association, WC Dkt. No. 14-192, at 11 (filed Dec. 22, 2014) ("[T]he Commission has held that the . . . [BOCs] are not required to combine Section 271 network elements – like local switching and shared transport – with one another.") (citing *TRO* n.1990).

D. Uncertainty as to BOCs' Obligations Regarding the Separation, Combination, and Commingling of Section 271 UNEs Threatens Granite's Ability to Compete

The Commission should issue a declaratory ruling to remove the uncertainty as to the BOCs' obligations not to separate, to combine, and to commingle Section 271 UNEs because this regulatory uncertainty threatens Granite's ability to compete in the business market. As Granite has previously explained to the Commission, it serves large, multi-location business customers that (1) generally require a relatively small number of voice lines (*e.g.*, 3-15 lines) and relatively limited data bandwidth; (2) are often located in suburban and rural areas where it is uneconomic for competitive LECs or cable companies to deploy fiber facilities, especially to provide the voice and data services demanded by these customers; and (3) have business needs that are generally not met by incumbent LECs or cable companies (*e.g.*, a demand for a single telecom service provider for all of their locations nationwide).[22] Granite is able to reach these business customer locations—which currently total more than 550,000 locations with nearly 1.4 million voice lines[23]—by purchasing combinations of unbundled DS0 loops, shared transport, and local switching from the BOCs.

The Section 271 checklist provides a critical regulatory backstop for Granite's and other competitors' commercial negotiations with the BOCs to obtain access to unbundled DS0 loops, shared transport, and local switching. The uncertainty governing the BOCs' obligations not to separate Section 271 UNEs and their obligations to combine and commingle Section 271 UNEs

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[22] *See, e.g.*, Comments of Granite Telecommunications, LLC, GN Dkt. No. 12-353, Exhibit A, Declaration of Kevin Nichols in Support of Granite Telecommunications, LLC, ¶¶ 4-14 (filed Jan. 28, 2013).

[23] Granite Telecommunications, LLC, About Granite, http://www.granitenet.com/About (last visited May 1, 2015).

undermines that regulatory backstop. The uncertainty therefore threatens competitors' ability to obtain viable wholesale agreements with the BOCs and to serve their customers in the future.

III. ARGUMENT

A. The Commission Should Issue a Declaratory Ruling Clarifying That Sections 202(a) and 201(b) of the Act Apply to the Separation and Combination of Section 271 UNEs

1. The Declaratory Ruling Would Be Consistent With Commission Precedent and the Terms of the Act

The Commission should remove the uncertainty as to whether BOCs are obligated to combine Section 271 UNEs with each other by issuing a declaratory ruling that Sections 202(a) and 201(b) of the Act apply to the separation and combination of Section 271 UNEs. Such a ruling would be entirely consistent with Commission precedent. Indeed, the Commission has already held that Sections 202(a) and 201(b) apply to the BOCs' provision of Section 271 UNEs. Specifically, in the *UNE Remand Order*, the Commission held that "[i]f a [section 271] checklist network element does not satisfy the unbundling standards in section 251(d)(2), *the applicable prices, terms, and conditions for that element are determined in accordance with sections 201(b) and 202(a)*."[24] There is no reason to believe that such terms and conditions somehow exclude those regarding the separation and combination of Section 271 UNEs. Accordingly, the Commission should make the following clarifications:

1. Where the requested Section 271 UNEs are already combined in a BOC's network for the provision of a telecommunications service, the BOC may not separate those UNEs unless requested by the competitive LEC or unless the BOC has a reasonable basis for doing so.

2. Where the requested Section 271 UNEs are not already combined in a BOC's network, the BOC must combine those UNEs upon request from the competitive LEC unless the BOC has a reasonable basis for refusing to do so.

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[24] *UNE Remand Order* ¶ 470 (emphasis added); *see also TRO* ¶ 662 ("We reach essentially the same result here [as in the *UNE Remand Order*] . . . .").

These clarifications are consistent with the terms of the Act. The first clarification is consistent with Section 202(a), which prohibits common carriers from engaging in "unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service."[25] When a BOC provides a preexisting combination of network elements to itself and to a requesting carrier, it is providing "like" services[26] under Section 202(a). It would be discriminatory for a BOC to make this service available to itself but not to a requesting carrier. Under Section 202(a), such discrimination is permitted only where reasonable.[27]

The second clarification is consistent with Section 202(a) and Section 201. When a BOC combines two or more previously uncombined network elements for itself and for a requesting carrier, it is providing "like" services[28] under Section 202(a). It would be discriminatory for the BOC to refuse to provide this service to a requesting carrier where the BOC ordinarily provides this service to itself. Again, under Section 202(a), such discrimination is permitted only where reasonable.

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[25] 47 U.S.C. § 202(a).

[26] *See, e.g.*, *MCI Telecomms. Corp. v. FCC*, 917 F.2d 30, 39 (D.C. Cir. 1990) ("[L]ikeness within the meaning of Section 202(a) turns upon the functional equivalency test, which focuses on whether the services in question are different in any material functional respect. We have said that in applying this test that the FCC must look to the nature of the services offered and determine if customers perceive them as performing the same functions.") (internal quotations and citations omitted). There is no question that when a BOC provides a preexisting combination of network elements to itself and to a requesting carrier, it is providing functionally equivalent services.

[27] *See* 47 U.S.C. § 202(a).

[28] There is no question that when a BOC combines two or more uncombined network elements for itself and for a requesting carrier, it is providing functionally equivalent services, which are "like" services within the meaning of Section 202(a). *See, e.g.*, *MCI Telecomms. Corp.*, 917 F.2d at 39.

Moreover, a BOC's act of combining two or more previously uncombined network elements is a "service" within the meaning of Section 201(a).[29] Under Section 201(a), the BOC must provide such a service to a requesting carrier unless the request for the service is unreasonable.[30] The act of combining network elements is also a "practice" within the meaning of Section 201(b).[31] Under Section 201(b), the BOC's practices must be just and reasonable.[32]

2. *The Commission's Statement in the TRO Does Not Preclude It From Issuing the Declaratory Ruling*

The Commission's footnote regarding Section 271 UNE combinations in the *TRO* in no way precludes the Commission from making the clarifications listed above. *First*, the footnote does not address situations where a BOC has already combined Section 271 checklist elements in its own network. In the footnote, the Commission "*decline[d] to require BOCs*, pursuant to section 271, *to combine* network elements" that are not required to be unbundled under Section 251.[33] The Commission said nothing about whether BOCs are permitted to separate Section 271 checklist elements that are already combined. And because the Commission has already held that Section 202(a) applies to the terms and conditions on which Section 271 UNEs are provisioned, it would be a violation of the Section 202(a) prohibition on unreasonable

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[29] 47 U.S.C. § 201(a).

[30] *Id.*

[31] *Id.* § 201(b).

[32] *Id.* In applying Sections 202(a) and 201(b) to the separation and combination of Section 271 UNEs, the Commission could consider what is permissible under Section 251(c)(3) of the Act. For example, in determining whether a BOC's refusal to combine Section 271 UNEs is reasonable, the Commission could consider the circumstances under which such refusal is permitted under the agency's Section 251 UNE combination rules (*e.g.*, the incumbent has proven that the requested combination is not technically feasible or would undermine the ability of other carriers to obtain access to UNEs or interconnection). *See* 47 C.F.R. § 51.315(c)-(f).

[33] *TRO* n.1990 (emphasis added).

discrimination for a BOC to refuse to provide Section 271 UNEs that are already combined to a competitive LEC in combined form without a reasonable basis for doing so.

Second, in the footnote, the Commission merely held that *Section 271* does not require BOCs to combine Section 271 UNEs; it said nothing about whether some other provision of the Act requires BOCs to combine Section 271 UNEs. Specifically, the Commission "decline[d] to require BOCs, *pursuant to section 271*, to combine network elements that no longer are required to be unbundled under section 251."[34] The Commission correctly observed that Section 271 is silent as to UNE combinations. Indeed, unlike Section 251(c)(3), Section 271 checklist items 4-6 neither mention "'combining'"[35] nor contain a nondiscrimination requirement. However, the absence of any reference to "combining" or nondiscrimination in Section 271(c)(2)(B)(iv)-(vi) does not mean that the Commission lacks the statutory authority to require BOCs to combine Section 271 UNEs with each other.[36] As the Commission has already found, "[a]lthough section 271 does not specify that the checklist network elements must be provided in accordance with section 251(c)(3), the Commission nonetheless has independent authority"—under Sections 201(b) and 202(a)—"to ensure that items (iv)-(vi) of the checklist are provided on a reasonable, nondiscriminatory basis."[37] This is precisely why, although the D.C. Circuit "agree[d] with the Commission that none of the requirements of § 251(c)(3) applies to items [four through six of]

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[34] *Id.* (emphasis added).

[35] *Id.*

[36] Nor can the absence of any reference to combining in Section 271(c)(2)(B)(iv)-(vi) be read to somehow *prohibit* the Commission from clarifying that BOCs have a duty to combine Section 271 UNEs with each other. An express requirement elsewhere in the Act (*e.g.*, a requirement regarding UNE combinations in Section 251(c)(3)) does not imply the absence of Commission authority to establish similar requirements pursuant to its general authority under Section 201(b)). *Cf. AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, n.9 (1999).

[37] *See UNE Remand Order* ¶¶ 470-472.

the § 271 competitive checklist," the court also stated that "[o]f course, the independent unbundling under § 271 is presumably governed by the *general* nondiscrimination requirement of § 202."[38] In fact, the only reason that the court did not rule on the issue of whether BOCs are obligated under Section 202(a) to combine Section 271 UNEs is that the petitioners had not raised it.[39]

3. There Are Sound Policy Reasons to Issue the Declaratory Ruling

There is no question that making the clarifications listed above would be sound policy. Indeed, the same policy rationale for the Commission's adoption of the Section 251 UNE combination rules applies to Section 271 UNE combinations. In particular, the Commission adopted a prohibition on the separation of Section 251 UNEs that are already combined (except upon request) to (1) prevent discrimination in violation of the nondiscrimination requirement in Section 251(c)(3); and (2) prevent conduct that impedes competition. The Commission explained its reasoning to the Supreme Court as follows:

> Rule 315(b) . . . forbids an anticompetitive practice that . . . the incumbents nowhere disavow as their objective: They want to disconnect previously connected elements, over the objection of the requesting carrier, not for any productive reason, but just to impose wasteful reconnection costs on new entrants. Put another way, the incumbents want to drain value out of their facilities to ensure that their competitors either spend money unnecessarily to replace the lost value or stay out of the market altogether. The result: an unnecessary expenditure of resources, no net increase in value, and thwarted prospects for competition.
>
> That anticompetitive exercise in economic waste is so plainly discriminatory that, even in the absence of a Commission rule, it would violate an incumbent's statutory obligation to provide "nondiscriminatory access to network

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[38] *United States Telecom Ass'n v. FCC*, 359 F.3d 554, 590 (D.C. Cir. 2004) (emphasis in original).

[39] *See id.* ("But as the only challenge the CLECs have presented to the FCC's § 271 combination rules is grounded in an erroneous claim of a cross-application of § 251, we do not pass on whether the § 271 combination rules satisfy the § 202 nondiscrimination requirement.").

> elements . . . on rates, terms and conditions that are just, reasonable, and nondiscriminatory."[40]

As the Commission further explained to the Court:

> It is the essence of discrimination for a telephone monopolist to impose gratuitous disassembly and reassembly charges on new entrants that it would not impose upon itself in any analogous circumstance (for example, when setting up service for its own customers) or to impose such charges for the purpose of raising a potential competitor's costs of entry into the monopolist's market.[41]

Similarly, here, making a clarification that BOCs cannot separate already combined Section 271 UNEs except upon request or a reasonable basis for doing so would (1) prevent unreasonable discrimination in the provision of such UNEs in violation of Section 202(a) of the Act; and (2) prevent conduct that would only serve to raise the input costs of the BOCs' competitors—such as Granite—in the downstream retail business market.

Furthermore, the same policy rationale for the Commission's adoption of its rule that incumbent LECs must combine Section 251 UNEs upon request, even if those UNEs are not already or ordinarily combined in the incumbent's network,[42] also applies to Section 271 UNE combinations. The Commission has explained that it adopted such a rule for Section 251 UNEs (1) "[b]ased on the nondiscrimination requirements of section 251(c)(3)"; and (2) "because incumbent LECs are in the best position to perform the functions necessary to provide UNE combinations (and to separate UNE combinations upon request) through their control of the elements of their networks that are unbundled."[43] Likewise, here, the Commission could and

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[40] Reply Brief for the Federal Petitioners and Brief for the Federal Cross-Respondents, *FCC v. Iowa Utils. Bd.*, Nos. 97-826 *et al.*, at 23 (U.S. filed June 17, 1998) (emphasis omitted).

[41] Opening Brief for the Federal Petitioners, *FCC v. Iowa Utils. Bd.*, No. 97-831, at 46 (U.S. filed Apr. 3, 1998).

[42] 47 C.F.R. § 51.315(c).

[43] *TRO* ¶ 573.

should clarify that BOCs must combine Section 271 UNEs upon request even if those network elements are not already or ordinarily combined absent a reasonable basis for refusing to do so (1) based on the prohibition on unreasonable discrimination in Section 202(a); and (2) because BOCs are in the best position to perform the functions necessary to combine the Section 271 UNEs in their networks.

B. The Commission Should Also Clarify That Sections 202(a) and 201(b) of the Act Apply to the Commingling of Section 271 UNEs With Wholesale Services

As mentioned in Part II.C above, the Commission has not established rules explicitly addressing the commingling of Section 271 UNEs with wholesale services. While courts have held that BOCs must commingle Section 251 UNEs with Section 271 UNEs,[44] the Commission has not established rules requiring BOCs to commingle Section 271 UNEs with other wholesale services such as special access. Thus, there is uncertainty as to whether BOCs have a statutory obligation to commingle Section 271 UNEs with wholesale services other than Section 251 UNEs. The Commission should remove this uncertainty by clarifying that Sections 202(a) and 201(b) of the Act apply to the commingling of Section 271 UNEs with wholesale services. Specifically, the Commission should clarify that BOCs are required to commingle, or allow competitive LECs to commingle, a Section 271 UNE or combination of such UNEs with wholesale services obtained from an incumbent LEC unless the BOC has a reasonable basis for refusing to do so.

The Commission has the authority to make this clarification. The agency has already held that Sections 202(a) and 201(b) apply to the terms and conditions on which Section 271

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[44] *BellSouth Telecomms., Inc. v. Kentucky Pub. Serv. Comm'n*, 669 F.3d 704, 712 (6th Cir. 2012); *NuVox Commc'ns, Inc. v. BellSouth Commc'ns, Inc.*, 530 F.3d 1330, 1333 (11th Cir. 2008).

UNEs are provisioned, and there is no reason to believe that such terms and conditions somehow exclude those governing the commingling of Section 271 UNEs.

The requested clarification is also consistent with the terms of the Act. A BOC's provision to itself of its network facilities for the provision of its own retail services and its provision of those same piece parts of the network to a requesting carrier for the provision of the requesting carrier's retail services are "like" services (*i.e.*, functionally equivalent services)[45] under Section 202(a). The underlying physical network that the BOC provides itself and "commingles" for the requesting carrier is the same and the physical act of combining these piece parts of the network is the same in both cases. It would be discriminatory if a BOC were to perform these functions for the provision of its own retail services, but refuse to perform the same functions for the provision of a requesting carrier's retail services. Such discrimination is only permitted under Section 202(a) if it is reasonable.[46]

Similarly, the act of commingling is a "service" under Section 201(a) and a "practice" under Section 201(b). As explained in Part III.A above, a BOC may not refuse to provide such a "service" if the request is reasonable and it may not engage in such a "practice" unless it is a reasonable one.

Furthermore, allowing a requesting carrier to perform its own commingling is also a "practice" under Section 201(b). Again, such a practice must be reasonable, and refusing to allow a requesting carrier to perform the commingling is only permissible under Section 201(b) if such refusal is reasonable.

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[45] *See supra* note 26.

[46] *See* 47 U.S.C. § 202(a).

Finally, there are sound policy reasons for adopting the requested clarification. Indeed, the Commission has already found that a restriction on the commingling of Section 251 UNEs with wholesale services would (1) "constitute an 'unjust and unreasonable practice' under section 201 of the Act, as well as an 'undue and unreasonable prejudice or advantage' under section 202 of the Act" because it would force unnecessary inefficiencies on competitive LECs; and (2) "be inconsistent with the nondiscrimination requirement in section 251(c)(3)" because incumbent LECs place no commingling restrictions on themselves for their own provision of service.[47] For similar policy reasons, the Commission should clarify that a restriction on commingling of Section 271 UNEs violates Sections 202(a) and 201(b) unless the restriction is reasonable.

IV. CONCLUSION

For the foregoing reasons, the Commission should grant the instant petition for declaratory ruling.

Respectfully submitted,

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[47] *TRO* ¶ 581.